of section 299, but not within section 300, clauses (2) and (3). The second part of section 304, Penal Code covers cases falling within the third part of section 299 not falling within section 300, clause (4).

In the present appeal we think that in view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of an intention on the part of the appellants to cause bodily injury to the deceased. Therefore in those circumstances, the fine distinction between section 299 and section 300 is very important and that point should have been put clearly to the jury in such a way that they would be able to come to a correct conclusion. The forensic practice of reading section 299 and section 300 to juries is likely to confuse rather than help. In view of what we have stated above, a case such as the present must therefore fall within the second part of section 299 or the third clause of section 300. Speaking generally, if the act must in all probability cause death, the offence is within section 300, Penal Code, and if the act is only likely to cause death, the offence falls within section 299, Penal Code. None of the exceptions to section 300, Penal Code were established. In ordinary circumstances we should probably have had little difficulty in upholding the convictions of the appellants for murder but in view of the nature of the medical evidence which we have touched on earlier, we felt the case might not unreasonably be brought within the lesser offence of culpable homicide not amounting to murder, falling within the first part of section 304, Penal Code. We have thought it necessary to deal with this matter at some length to ensure if possible that our finding shall not be construed as a declaration that in all cases such as the present the offence is culpable homicide not amounting to murder.

We set aside the convictions for murder, and substitute them with one under the first part of section 304, Penal Code read with section 34, Penal Code and sentenced each of the appellant to 10 years' imprisonment effective from their dates of arrest.

Order accordingly.

Solicitors: *Dato' S.M. Yong & Co.*

YAP CHENG KEE & ANOR. v. OW GIAM ENG & ANOR.

[F.C. (Ali Ag. L.P., Ong Hock Sim and Raja Azlan Shah F.JJ.) January 31, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 144 of 1975]

Landlord and Tenant — Claim for possession — Statutory tenant — Whether father of appellants statutory tenant or contractual tenant — Admission by counsel — Rent and Charged Land (Restriction) Enactment, 1940, ss. 3 and 7.

Practice and procedure — Admission by counsel — Whether question could be argued on appeal.

The respondent claimed possession of certain premises from the appellants. The premises had been let to the father of the appellants who had since died and the question was whether the father was a contractual tenant or a statutory tenant. An application had been made under the Rent and Charged Land (Restriction) Enactment, 1940, for permission to take proceedings to eject the father but this had been dismissed. The learned Magistrate held that this made the father a statutory tenant and as this point was admitted by counsel for the appellants, the learned Magistrate gave judgment for the respondents. This decision was upheld on appeal to the High Court. The appellants appealed to the Federal Court.

Held, allowing the appeal: (1) the question of whether the deceased was a statutory tenant could be decided on the appeal, even though counsel had made an erroneous admission;

(2) as the landlord's application under the Rent and Charged Land (Restriction) Enactment had been dismissed, the contractual tenancy remained undisturbed and the learned Magistrate was therefore wrong in holding that the deceased had become a statutory tenant;

(3) the appellants as legal representatives and as children residing with the deceased at the time of his death were clearly in law entitled to tenancy of the premises.

Case referred to:-

(1) *Naharani Beni Pershad Koeri* v. *Dudh Nath Roy et al* (1899) 26 I.A. 216, 221.

FEDERAL COURT.

E. Joseph Jr. for the appellants.

Atma Singh Gill for the respondents.

Ali Ag. L.P. (delivering the judgment of the Court): This is an appeal from the decision of the High Court at Seremban, upholding the order of the Magistrate Seremban for eviction of the appellants in respect of premises No. 11, Main Road, Bahau.

It was contended that the appellants are not entitled to the tenancy of the premises as their father, now deceased, was only a statutory tenant. It is not understood what is implied by the notation "Both Counsel making admission on pleadings and not calling witnesses" when there clearly is an issue raised thereon. We refer to paragraph 3 of the Statement of Claim which we now set out: —

"3. The said Yap Boot alias Yap Eng Kee (deceased) (hereinafter referred to as 'the said deceased') by virtue of an application No. 15 of 1947 made to the then Rent Assessment Board, Kuala Pilah, brought by the plaintiffs' predecessors in title, for eviction which was heard and dismissed on December 19, 1947 by the said Board, the said deceased became a Statutory Tenant."

We also refer to paragraph 3 of the defence which reads: —

"3. The defendants have no knowledge of the contents of paragraph 3 of the Statement of Claim and put the plaintiffs to strict proof of the contents thereof."

As appears from the learned Magistrate's Grounds of Decision, he was of the view that counsel agreed the appellants' father was a statutory tenant and confined himself to the question whether the children of a statutory tenant were entitled to the tenancy after his death. It is unarguable that a statutory tenant has a purely personal right. But was deceased a statutory tenant? This can be decided here even if counsel had made an erroneous admission. I would quote a passage from *Maharani Beni Pershad Koeri* v. *Dudh Nath Roy et al.*[1]: —

"In the opinion of their Lordships this admission, if correctly understood, was erroneous in point of law, and does not preclude the counsel for the appellant on this appeal from claiming his client's legal rights."

The learned judge on appeal from the Magistrate's decision said: —

"... I allowed Mr. Atma Singh to put in a certified copy of the judgment of the Rent Board Kuala Pilah dated December 19, 1947 (Exhibit'A'). The outcome of the failure of that ejectment proceedings was that the deceased became in effect a statutory tenant, though this term was not so called in the Rent and Charged Land (Restriction) Enactment, 1940, the law pertaining at that time."

We respectfully disagree. The Rent and Charged Land (Restriction) Enactment (No. 14 of 1940) has no definition of statutory tenant. Section 3 provides that "tenant" includes the widow of a tenant dying intestate who was residing with him at the time of his death. The relevant section under which the proceedings before the Rent Assessment Board Kuala Pilah was instituted is section 7. This reads: —

"7. No landlord shall without the permission of the Board in writing eject or apply to any court for an order for the ejectment of or take any step towards ejecting his tenant from any premises to which this Enactment applies: Provided that this section shall not apply to ejectment for non-payment of rent where rent at a lawful rate has been in arrear for fourteen days."

As the landlord's application was dismissed, the contractual tenancy continued undisturbed. Upon his death, the appellants both as legal personal representatives and as children residing with him at the time of his death are clearly in law entitled to tenancy of the premises.

We allow the appeal and quash the orders of the High Court and the Magistrate's Court including order for payment of costs by the appellant. We make no order for costs here as we think counsel for both sides must accept responsibility for the action coming as far as it has done.

Appeal allowed.

Solicitors: *Joseph & Son; Gill & Tang.*

YOONG HOCK PIN v. PUBLIC PROSECUTOR

[F.C. (Ali Ag. C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) February 5, 1977]

[Kuala Lumpur — Federal Court Criminal Reference No. 2 of 1976]

Criminal Law and Procedure — Criminal breach of trust — Proof of entrustment of property to the accused — Duty of prosecution to prove its case — Appeal — Whether appellate court can alter charge.

Penal Code, s. 409 — Charge — Amendment at appellate stage.

In this case the appellant was charged with criminal breach of trust of a sum of $1,411.25 between May 1, 1972 and May 29, 1972. The learned President of the Sessions Court found as a fact that some money had been handed to the appellant which had not been accounted for. As he found that the appellant had failed to satisfy beyond merely denying that he had misappropriated the money, he convicted the appellant. On appeal, the learned judge found some doubt as to the actual sum handed over to the accused. He found however that the money received by the appellant amounted to $392.21 and he varied the conviction to one of criminal breach of trust of that sum. He then reserved certain questions for the decision of the Federal Court.

Held: (1) in a prosecution for a charge of criminal breach of trust of a specified sum of money, it is not sufficient for the trial judge to hold that some money had been handed to the accused in order to conclude that a *prima facie* case had been made out against him;

(2) it is not incumbent or necessary for the accused to offer an explanation when the prosecution has not in fact shown a *prima facie* case against him;

(3) it was not competent for the learned judge on appeal to amend the charge;

(4) in this case the court should go beyond answering the question of law posed and the conviction and sentence should be set aside.

Cases referred to:-

(1) *Quek Ching Kim* v. *Reg.* [1956] M.L.J. 54.

(2) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.

FEDERAL COURT.

H. D'Cruz for the appellant.

Datuk Abdullah bin Ngah (Senior Federal Counsel) for the respondent.

Ali Ag. C.J. (Malaya) (delivering the judgment of the Court): This reference under section 66 of the Courts of the Judicature Act, 1964, from the High Court Malacca reserved the following questions of law of public interest for the decision of this court, namely: —

"1. In a prosecution for a charge under section 409 of the Penal Code whereby the accused is alleged to have committed criminal breach of trust of a specified sum of money, is it sufficient for the learned President to hold as a finding of fact that '... some money had been handed to the accused ...' in order to conclude that a *prima facie* case had been made out against him?

2. In a prosecution for a charge under section 409 of the Penal Code whereby the accused is alleged to have committed criminal breach of trust of a specified sum of money, is it incumbent upon the accused to provide an explanation when the actual sum in respect of which he is alleged to have committed criminal breach of trust has not been determined by evidence?

3. In a prosecution for a charge under section 409 of the Penal Code whereby the accused is alleged to have committed criminal breach of trust of a specified sum of money, is it necessary for the accused to offer an explanation as to what